IN THE

SUPREME COURT OF THE UNITED STATES.

MARGARET CUNNIUS, NOW MARGARET SMITH.

PLAINTIFF IN ERROR,

v.

THE READING SCHOOL DISTRICT.

DEFENDANT IN ERROR.

BRIEF OF DEFENDANT IN ERROR.

QUESTION INVOLVED.

The question involved is simply whether the Legislature of a State can clothe one of its courts with special jurisdiction over the estates of those, who by reason of long absence are presumed to be dead, and can ordain constructive notice as sufficient, when the supposed decedent is in fact alive and a non-resident, but has property within the jurisdiction of the court.

The treatment of this subject naturally resolves itself into two heads: (1) The Question of Jurisdiction over the Subject-Matter; (2) The Question of Jurisdiction over the Person and Property of the Absentee. To which we have added: (3) Discussion of the Terms and Effects of the Act of 1885 and of Some Objections thereto.

BRIEF OF ARGUMENT.

FIRST POINT.—The Question of Jurisdiction over the Subject-Matter.

Jurisdiction is defined by this Court as "The power to hear and determine a cause," *U. S. v. Arredonda, 6 Peters, 709;* and is divided into two branches, jurisdiction over the subject-matter and over the person or property of the defendant.

"By jurisdiction over the subject-matter is meant the nature of the cause of action and of the relief sought; and this is conferred by the sovereign authority which organizes the Court, and is to be sought for in the general nature of its powers, or in authority especially conferred. Jurisdiction of the person is obtained by the service of process or by the voluntary appearance of the party in the progress of the cause. Jurisdiction of the *res* is obtained by a seizure under process of the court. * * * While the general rule in regard to jurisdiction *in rem* requires the actual seizure and possession of the thing by the officer of the Court, such jurisdiction may be acquired by acts which are of equivalent import, and which stand for and represent the dominion of the Court over the thing, and, in effect, subject it to the control of the Court." *Cooper v. Reynolds, 10 Wallace, 316, 317.* And in *Pennoyer v. Neff, 95 U. S., 714, 733,* Justice Field follows the first branch of this definition by saying that to give proceedings validity "there must be a tribunal competent by its constitution—that is, by the law of its creation—to pass upon the subject-matter of the suit."

The idea which has dominated every previous contention of the plaintiff's counsel and which remains the framework of his argument in this Court, is that the Orphans' Court of Pennsylvania, having jurisdiction only over the estates of the dead, has no authority to administer upon the property of the living. But the Act of 1885 created a new jurisdiction, one which the Legislature might just as well have vested in the Common

Pleas as in the Orphans' Court, a grant of powers distinctly intended to confer complete authority over the subject-matter; and, if the subsequent process for obtaining service is not illegal, the Supreme Court in reversing this case must go the length of declaring that the sovereign Legislature of Pennsylvania, or of any other State, has no right to confer jurisdiction over the estates of those presumed to be dead upon any of its tribunals.

Keeping this idea constantly in mind, we wish to review with some care the principal authorities cited by the plaintiff.

Under the common law or statutory powers originally committed to probate courts, they were, possibly, incapable of acquiring jurisdiction over the estates of the living, no matter what were the surrounding circumstances.

Justice Buller, in *Allen v. Dundas, 3 T. R., 129, 130*, declares that in the probate of the will of a living person the ecclesiastical court "have no jurisdiction, their whole proceedings are a nullity." And Chief Justice Marshall, in *Griffith v. Frazier, 8 Cranch, 9, 23*, says: "Suppose administration to be granted on an estate of a person not really dead. The act, all will admit, is totally void. * * * The case, in truth, was not one within his (the ordinary's) jurisdiction. It was not one in which he had a right to deliberate. It was not committed to him by the law."

There were no statutes enlarging the probate court's jurisdiction in either of the above cases. Indeed, in both instances the point was not directly in issue, and was merely used as an illustration, the statement of a legal principle the correctness of which it is not necessary to dispute. Two respectable courts have taken a contrary view to that expressed by Buller and Marshall, *Roderigas v. East River Savings Institution, 63 N. Y., 460;* and *Plume v. Howard Savings Institution, 17 Vroom, 211;* but the majority of the decisions have followed these early precedents. We have carefully examined the following authorities, collected either by the appellant or by ourselves, and with two exceptions—easily distinguishable from the Pennsylvania

enactment—there was no law conferring even the semblance of authority upon the probate courts.

The first of the following groups contains all those which state, as a mere *obiter dictum*, that administration upon the estate of the living is a nullity—the second group contains those where the same principle was directly in issue.

Day v. Floyd, 130 Mass., 488, 489; Andrews v. Avory, 14 Grattan, 229, 236; Moore v. Smith, 11 Richardson, 569; Withers v. Patterson, 27 Texas, 491, 497; Johnson v. Beazley, 65 Missouri, 250, 264; Perry v. St. Joseph & Western Railroad, 29 Kansas, 420, 423; Fish v. Nowell, 9 Texas, 13, 18; Morgan v. Dodge, 44 N. H., 255, 259; Quidort's Adm. v. Pergeaux, 18 N. J. Eq., 472; Martin v. Robinson, 67 Texas, 368; Waters v. Stickney, 12 Allen, 1, 13; Hamilton v. Brown, 161 U. S., 256, 267.

French v. Frazier, 7 J. J. Marsh, 425, 427; State v. White, 7 Iredell, 116; Duncan v. Stewart, 25 Alabama, 408; Melia v. Simmons, 45 Wisconsin, 334; Thomas v. People, 107 Illinois, 517; Jochumsen v. Suffolk Savings Bank, 3 Allen, 87, 96; Devlin v. Commonwealth, 101 Pa., 273; Burns v. VanLoan, 29 La. Ann., 560, 563; Springer v. Shavender, 118 N. Car., 33; Schleicher v. Gutbrod, 34 S. W. R., 550; Stevenson v. Superior Court, 62 Cal., 65; Scott v. McNeal, 154 U. S., 34.

All of these were decided in the absence of any local statute similar to the act of 1885, and there are some other authorities which refer directly to the existence of such local statute as a circumstance which might alter the case. Wharton on Evidence Vol. II, Sec. 810, asserts that the probate court has no jurisdiction over the living "unless under a peculiar and local statute"; and "*apart from such statute* we must hold that letters of administration to a living person are void." In *D'Arusement v. Jones, 4 Lea, 251*, the Court, after deciding that administration upon the estate of a living person is a nullity, observe: "We have no statute authorizing administration to be granted upon seven years' absence without being

heard from. * * * It might be different if we had a statute such as exists in Rhode Island or such as the New York Court seems to have construed theirs to be."

This brings us to the consideration of the only case, which, superficially at least, seems to militate against us, *Carr v. Brown, 20 R. I., 217; 38 Atl., 9.* This held that a law providing for administration upon the estate of one who has been absent and "not heard from directly or indirectly, for the term of seven years," as if he were dead, violates the Fourteenth Amendment of the Constitution. Even allowing this judgment its greatest effect against the appellee—as holding that a State can never give its courts jurisdiction over the subject-matter in question—the decision of the Rhode Island bench can have no more binding effect upon this Court than is accorded to the opinion of Chief Justice Mitchell and his Pennsylvania associates in the present proceedings, but each one must be weighed according to the reasons and principles which the opposing jurists have advanced.

But the statutes of the two States, though seemingly somewhat similar in purpose, differ materially in some most essential particulars. The Pennsylvania law is constructed with far greater care and foresight than the Rhode Island one, and guards the rights of the absentee much more securely. In the latter State no refunding bonds are required, no formal procedure is adopted, and the whole matter is disposed of by treating it "as if he were dead." After three years, distribution can be made of the absentee's estate without affording him any means of redress. But the vital point of difference is that the Rhode Island statute provides notice only "to the relations and heirs" of the supposed decedent and, being thus an attempt to institute an action *in rem* without even constructive notice to the defendant, the probate court never acquired jurisdiction of the person or property, and hence the proceeding was without due process of law. *Lavin v. Emigrant Industrial Association, 18 Blatchford, 1, 24,* a case upon practically the same Rhode Island statute—except that here the

presumption of death was established after three years—decided "that it is not competent for a State, by a law declaring a judicial determination that a man is dead, made in his absence, *and without any notice to or process against him*, conclusive for the purpose of divesting him of his property and vesting it in an administrator." The Pennsylvania statute is most particular in this vital question of notice, and provides for two—one, of the fact that letters have been applied for and that the Court will hear evidence concerning the alleged absence—the other, after such hearing, to the "supposed decedent, if alive, or any other person for him," to produce satisfactory evidence of continuance in life. (See Act of 1885, Sections 1 and 3, Appellant's Brief, p. 26.) By this notice to the supposed decedent the Pennsylvania statute recognizes the fact, (subsequently discussed in this Brief), that no proceeding *in rem* can be conducted without constructive notice to the defendant himself, and provides that such notice shall be given. In the proceedings upon the supposed death of Margaret Cunnius these provisions were rigidly followed. (Printed Record pp. 19 and 20.)

The other case relied upon by appellant as one where a legislative grant of jurisdiction over the subject-matter was declared invalid by a State Supreme Court, is that of *Clapp v. Houg, 98 N. W. R. (North Dakota), 710.* This was an abortive effort by the Legislature to vest its courts with powers of administration *without any notice at all*, and was, therefore, clearly unconstitutional. The statute provides for the appointment of a special administrator, when, on account of unsatisfactory proof of death, the court has refused to appoint a general administrator, but there is ground to believe that the person is dead or secreted. The Act requires no notice either to the supposed decedent or to anybody interested in the estate, and is an attempt to acquire jurisdiction over the person and property of the defendant without even constructive notice—a proceeding recognized as worthless by every reputable authority. The Dakota Court concede (p. 711) that *jurisdiction over the subject-matter may be conferred upon some State tribunal*, and base their judgment against the

constitutionality of the Act distinctly upon the want of jurisdiction over the person or property of the defendant. "The absence of notice," they say, (p. 712–713) "renders the proceedings void and the statute is of no validity, as against the property of a living person, because it does not provide for notice to him." And again (p. 712, *supra*): "If this law in fact contemplates the taking possession of the property of a living person, he should have an opportunity to be heard, upon some kind of notice." It will be observed that the Court does not say "actual," but merely "some kind of notice," which, without any violence to the meaning of the phrase, may be reasonably construed as "constructive notice," as this is the only notice possible when the very point in issue is the absence of the defendant. In the important consideration of notice the Pennsylvania statute is as different from the Dakota one as day is from night.

But the case principally relied upon by appellant is that of *Scott v. McNeal, 154 U. S., 34*, where Justice Gray decided that a sale by an administrator, appointed under the general probate laws of a State, upon the estate of a person supposed to be dead, passed no title to the purchaser. In this case there was no statute, like the Pennsylvania Act of 1885, conferring special authority for the purpose, and the judgment is distinctly based upon the Court's want of jurisdiction over the subject-matter. But express jurisdiction in this respect is given to the Orphans' Court by the Act in question and *Scott v. McNeal* is therefore not in point. Chief Justice Mitchell has discussed the McNeal case with his usual clearness and ability, and concludes that its ruling has no bearing upon the present issue. We refer your Honors to his opinion (Printed Record, p. 4–5) and have nothing further to add.

Another particular in which proceedings under the Act of 1885 differ from those in all the decisions above cited is that here there is no distinct finding of death. The Orphans' Court decides that the person is absent and presumed to be dead, and the whole scope of the Act is to the effect that the absentee may not be dead, as is shown by the provisions made for his reap-

pearance. The grant of letters, therefore, is predicated not upon a finding of death, but upon an unexplained absence from which death may be presumed.

As all the above decisions were rendered in the absence of any act conferring jurisdiction over the subject-matter, or were founded upon errors in obtaining jurisdiction over the person, the appellant is forced into the desperate position of contending that the sovereign Legislature of a State can not under any circumstances clothe its courts with authority over the estates of those presumed to be dead, and for his support invokes the aid of the "due process of law" clause in the Fourteenth Amendment.

In this connection it may not be amiss to quote a few words from Justice Miller, upon the above prohibition: "It would seem from the character of many of the cases before us, and the arguments made in them, that the clause under consideration is looked upon as a means of bringing to the test of the decision of this Court the abstract opinions of every unsuccesful litigant in a State Court of the justice of the decision against him, and of the merits of the legislation on which such a decision may be founded." *Davidson v. New Orleans, 96 U. S., 97, 104.* Without entering at length into definitions of the phrase and into instances of the numberless proceedings in which it has been established, investigation shows that the prohibition has been applied almost exclusively to matters of procedure conducted in an illegal manner—for example, questions involving jurisdiction over the person and property—and only in the most flagrant instances employed to declare that a Legislature cannot make a valid grant of jurisdiction to its courts over any legitimate subject-matter, provided the subsequent steps be according to law.

Such a grant of authority the Pennsylvania Assembly directly conveyed by the Act of 1885. It is an elementary principle that statutes are to be construed according to the intention of the Legislature. The intention of the Legislature to confer jurisdiction over the subject-matter is clear beyond a peradven-

ture. The former practice was for the register to grant letters upon the common-law presumption of death after seven years' absence. But this method was rendered worthless by the opinion in *Devlin v. Commonwealth, 101 Pa., 272*, delivered in November, 1882, which held such administration absolutely void. The law was thus left in chaotic condition, for if a resident of the State disappeared, there was no way of settling his estate. This predicament occasioned the almost immediate passage of the Act of 1885, which provided for the very needs arising from the destruction of the old system by *Devlin v. Commonwealth*. The Supreme Court had grounded their decision upon the want of jurisdiction of the register, and had remarked: "It might, indeed, be true that, were we to concede to the register judicial powers of a general character, as was conceded to the surrogate in the case of *Roderigas v. The East River Savings Bank, 63 N. Y., 460*, the decree in the case might be regarded as conclusive until reversed" (p.276). It was the results of this very decision which the Act of 1885 was designed to remedy, and it was reliance upon this very citation which occasioned its peculiar provisions. The Court had held that there was no jurisdiction over the subject-matter. The Act created a special jurisdiction to cover such cases. The Court had demanded "judicial powers of a general character." The Act removed jurisdiction from the register, a mere inferior tribunal, and vested it in the Orphans' Court, a Court of record and general powers, whose decrees can not be attached collaterally. Act of 1832, *Pamphlet Laws, 190*.

The grant to a court of jurisdiction over the estates of those who by reason of long absence are probably dead would seem a highly beneficial, and, if the process were proper, a legal and rational, exercise of legislative discretion. In the absence of reason or authority against the validity of such a grant, and enforced by overwhelming considerations of its expediency, we turn to legislative grants of a generally similar jurisdiction which have been passed upon by this Court.

In *Arndt v. Griggs, 134 U. S., 316,* an action was brought to recover possession of land and to quiet title. The Nebraska statute provided as follows: "Service may be made by publication in either of the following cases: * * * * Fourth. In actions which relate to, or the subject of which is, real or personal property in this State where any defendant has or claims a lien or interest, actual or contingent, therein, or the relief demanded consists wholly or partially in excluding him from any interest therein, and such defendant is a non-resident of the State" (p. 318). In other words, a special jurisdiction over the subject-matter was conferred upon courts of equity, which grant was attacked as invalid in the proceeding before the Federal Court. In deciding that such an act is a valid exercise of legislative powers, Justice Brewer says: "The question is not what a court of equity, by virtue of its general powers and in the absence of a statute, might do, but it is what jurisdiction has a State over titles to real estate within its limits, and what jurisdiction may it give by statute to its own courts, to determine the validity and extent of the claims of non-residents to such real estate? If a state has no power to bring a non-resident into its courts for any purposes by publication, it is impotent to protect the titles of real estate within its limits held by its own citizens. * * * But no such imperfections attend the sovereignty of the State. It has control over property within its limits" (p. 320). And again, quoting with approval *Dillen v. Heller, 39 Kansas, 599:* "Has the State any power, through the legislature and the courts, or by any other means or instrumentalities, to dispose of or control property in the State belonging to non-resident owners out of the State, where such non-resident owners will not voluntarily surrender jurisdiction of their persons to the State or to the courts of the State, and where the most urgent public policy and justice require that the State and its courts should assume jurisdiction over such property? * * * We think a sovereign State has the power to do just such a thing. All things within the territorial boundaries of a sovereignty are within its jurisdiction; and gen-

erally within its own boundaries a sovereignty is supreme" (pp. 322–323).

The case of *Arndt v. Griggs* was the natural outcome of *Boswell's Lessee v. Otis, 9 Howard, 336.* Here the special equitable jurisdiction created by statute (p. 339; Sec. 12 of statute) was not directly in issue; but the Court admitted that such jurisdiction was not invalid, if properly executed, and said: "The property of an individual is subject, in a certain sense, to the law of the State in which it is situated. It is liable for taxes and to such special proceedings against it as the law shall authorize" (p. 349).

The identity of principle between the Arndt case and the Cunnius one is plainly apparent. The courts had held that a chancellor had no power to make decrees quieting title against a non-appearing non-resident. The Nebraska Legislature clothed their courts with authority over the subject-matter. The Supreme Court of the United States declared this grant proper, provided there be property of the non-resident within the jurisdiction of the court. Following a like line of reasoning, the courts have held that a court of probate has no power over the estates of those presumed to be dead. The Legislature vests such power in the Orphans' Court. If the alleged decedent has property within the State, how can such a grant be declared illegal by this Court without violating the principles it has formerly enunciated?

In *Bennett v. Fenton, 41 Fed. R. 283,* Arndt v. Griggs was directly followed, and a Federal statute, (*18 Stat. at Large, p. 472, Sec. 8*), conferring upon the United States Courts the power to remove an encumbrance or cloud from the title to real or personal property within the district by publication upon a non-resident, was held a valid exercise of legislative power. To the same effect are *Roller v. Holly, 176 U. S., 398; Shepherd v. Ware, 48 N. W. R., (Minn.) 773; Gray v. Gates, 37 Wis. 614.* It is true that in most if not all of these cases the proceedings were upon real estate; but it makes no difference in principle whether the proper be real or personal,

provided it lies within the jurisdiction of the court. In the same way, provided assets of the supposed decedent are within the jurisdiction of the Orphans' Court and provided the constructive service be legal—questions which we shall proceed to consider—an act conferring jurisdiction over the estates of those presumed to be dead is on the same footing as one conferring jurisdiction over bills *quia timet* and for the quieting of title, and should receive the same judicial sanction from this Court.

SECOND POINT.—The Question of Jurisdiction over the Person and Property of the Absentee.

Admitting that the Legislature could confer judicial power over the subject-matter, our position under the second branch of the subject is, briefly stated, as follows: The Orphans' Court having authority over the estates of absentees presumed to be dead, who have left property within the jurisdiction of the Court, the proceedings thereon are adapted to like cases of administration upon actual decedents, follow such precedents as closely as possible, and are therefore, substantially proceedings *in rem*.

At the outset we are confronted by appellant's novel proposition that the plaintiff's dower right was a mere chose in action, which, for the purposes of jurisdiction followed the domicil of the creditor, and hence, as she was a non-resident, there was no property of hers in Pennsylvania over which the Court could exert authority. This reasoning is ingenious, but fallacious. It is true that for certain purposes a chose in action follows the domicil of the owner; but for certain other purposes—as in conferring jurisdiction upon courts, the very question in issue—such property has its situs in the place where, for all practical purposes, it is actually located. Especially is this the case in a dower interest, which from its very nature has a fixed locality where its legal rights can always be asserted. Statutory dower in Pennsylvania is not a mere lien or charge, but an

actual interest in land, *Kinsehman v. Stine, 192 Pa., 462, 464;* and this interest is subject to an execution against the owner. *Shaupe v. Shaupe, 12 Sergeant & Rawle, 9, 12; Schall's Appeal, 40 Pa., 170, 177.* But whether a chose in action, an interest in land, or a right in a decedent's estate, a dower charge has a distinct situs in Pennsylvania, even against a non-resident, as is shown by the fact that it is liable to seizure under foreign attachment. The laws of the State provide for such attachment upon "all and singular the goods and chattles, lands and tenements" of a debtor, Act of 1836, Pamphlet Laws, pp. 568, 580; and it needs no law dictionary to prove that "chattels" covers every species of chose in action, including a dower right. In addition, the Act of 1842, Pamphlet Laws, p. 436, declares that any interest in the real or personal estate of a decedent is subject to foreign attachment; and finally, it has been held that any definite debt due to a non-resident, when his debtor is in reach of process, is subject to such attachment. *Furness v. Smith, 30 Pa., 520, 522.* If Mrs. Cunnius had had creditors in Pennsylvania, she would soon have discovered, in spite of her counsel's protestations, that she possessed property in that State which could be detached from her personal domicil. Nor do the authorities cited by appellant establish his proposition. The case of *State Tax on Foreign Bonds, 15 Wallace, 300,* was a judgment against the validity of a State tax upon the *interest* due to bondholders of certain bonds secured by a mortgage both in Pennsylvania and Ohio, said tax not being levied upon the railroad, upon the mortgage, or upon the bondholders thereof; and even then four members of the Court dissented. (See this case explained in *Savings Society v. Multnomah Co., 169 U. S. 421, 428.*) While in the other case *Bristol v. Washington Co., 177 U. S., 133,* Chief Justice Fuller, far from holding that personal property follows the person of the owner or creditor, even for purposes of local taxation, speaks as follows: "There have been frequent recognitions of its (a State's) power to separate for purposes of taxation the situs of personal property from the domicil of the

owner" (p. 144). "Personal property, as this Court has declared again and again, may be taxed, either at the domicil of its owner, or at the place where the property is situated, even if the owner is neither a citizen, nor a resident of the State which imposes the tax" (p. 145).

But as procedure in the case of those presumed to be dead follows the examples of general administration upon decedents' estates, it is clear that for such purposes there was property of the absentee within the jurisdiction of the Court. It is a general principle of both the common and statutory law that if the decedent be a non-resident, administration will be granted by the court within whose jurisdiction there are assets of the decedent; and that if such assets are simple contract debts merely, the domicil of the decedent's debtor determines the situs of the administration. *Wyman v. Halstead, Adm., 109 U. S. 654*, and cases cited on page 656. This rule applies in Pennsylvania, even where a single debt is the only estate of the decedent within the Commonwealth. *Sayre v. Helme, 61 Pa. 299; Mansfield v. McFarland, 202 Pa. 173, 175.*

The next head of our argument is that proceedings under the Act of 1885, being adapted to like cases of administration upon the estates of the dead, are substantially proceedings *in rem* and constructive notice, if reasonable, is sufficient. Indeed, if it be once admitted that a Legislature has power to clothe its courts with jurisdiction over the estates of supposed decedents, the conclusion is irresistible that constructive notice can be used, personal service being impossible upon a person who produces no evidence of being alive. It is this circumstance which has forced appellant to the seemingly untenable position that a Legislature can make no such grant. Much of the question of constructive notice and of actions *in personam* and *in rem* has necessarily been treated under our First Point, but as this subject has been analyzed and commented upon in every brief and opinion thus far presented, it seems worthy of fuller and more careful discussion.

Justice Field, in *Pennoyer v. Neff* (p. 734), speaks of a judgment *in rem* as follows: "It is true that, in a strict sense, a proceeding *in rem* is one taken directly against property, and has for its object the disposition of the property, without reference to the title of individual claimants; but in a larger and more general sense the terms are applied to actions between parties where the direct object is to reach and dispose of property owned by them, or of some interest therein." And again (p. 727) "Such service (*i. e.*, by publication) may also be sufficient in cases where the object of the action is to reach and dispose of property in the state, or of some interest therein, by enforcing a contract or a lien respecting the same or to partition it among different owners or, when the public is a party, to condemn and appropriate it for public use. In other words, such service may answer in all actions which are substantially *in rem*."

The leading case of *Woodruff v. Taylor, 20 Vt., 73, 74*, expresses the following views: "A judgment *in rem* I understand to be an adjudication pronounced upon the status of some particular subject-matter, by a tribunal having competent authority for that purpose. * * * A judgment *in rem* is founded upon a proceeding instituted not against the person as such, but against or upon the thing or subject-matter itself, whose state or condition is to be determined."

In opening his chapter upon the subject, Freeman writes: "We now come to the consideration of a class of judgments very well understood, but quite difficult to describe;" and, after analyzing the various definitions and admitting that none thoroughly covers the ground, he suggests "that a judgment is *in rem* whenever the process and proceedings are such as to warn all persons that the court may render judgment affecting certain property and their interests therein, and that they must, at or within a time specified, appear before the Court if they wish to protect those interests from judicial condemnation." *Freeman on Judgments, Section 607.*

These definitions, narrow as they may be, evidently include within their scope such proceedings as were taken in the present case. But no definitions are at once comprehensive and exact, though on the other hand the authorities substantially agree as to what actions belong to one class and what to the other. The difficulty has been to distinguish between proceedings strictly *in rem* and those in the nature of proceedings *in rem*. This is the pitfall into which the appellant has fallen, when he argues that there must be a *previous* seizure of property before an action *in rem* is permissible. Black with his usual clearness warns against this very inaccuracy:

"Much of the uncertainty and confusion in the definitions of proceedings *in rem* has arisen from the attempt to make that term cover various classes of actions which are not strictly and purely *in rem*, although they exhibit some points of analogy or resemblance to the proceedings which fall within the narrower use of the phrase. It is better to distinguish between proceedings *in rem* and proceedings *quasi in rem*." *Black on Judgments, Sec. 793.* The Supreme Court of the United States has affirmed this distinction in almost the same words. In *Freeman v. Alderson, 119 U. S., 185, 187–188*, Justice Field says: "There is, however, a large class of cases which are not strictly speaking actions *in rem*, because though brought against persons, they only seek to subject certain property of those persons to the discharge of the claims asserted * * * * * Indeed all proceedings having for their sole object the sale or other disposition of the property of the defendant to satisfy the demands of the plaintif, are in a general way thus designated." In *Heidritter v. Oil Cloth Co., 112 U. S. 294, 302*, Judge Matthews, in discussing the acquisition of jurisdiction over property under proceedings *in rem*, says: "This, as we have seen, is ordinarily done by actual seizure, but may be done by the mere bringing of the suit in which the claim is sought to be enforced, which may by law be equivalent to a seizure, being the open and public exercise of dominion over it for the purposes of the suit."

It is generally agreed that the following proceedings are substantially *in rem*: Attachment proceedings; condemnation under the excise or revenue laws; inquisitions of lunacy; divorce; questions of settlement, identity, and pedigree; bankruptcy; judgments for taxes and assessments; foreclosure of liens; decrees of sale; proceedings in probate and administration; and establishment of roads and boundaries. This is the list given by *Black, Sec. 799–812*, to which may be added some few others. It may be that a decree strictly *in rem* requires a previous seizure to clothe the Court with jurisdiction, as in prize cases and forfeiture of goods for breach of excise—both examples of proceedings purely *in rem*; but that such a rule applies in actions *quasi in rem* is established neither by principle nor precedent. Every practitioner knows that decrees in divorce and the probate of wills are in the nature of proceedings *in rem*, especially in the vital feature of constructive notice, *Freeman, Secs. 608, 610; Black, Secs. 803, 808*; yet who would contend that there must be a previous seizure of property here before jurisdiction can attach? Indeed the very authority which appellant's counsel is constantly calling to his assistance, *Pennoyer v. Neff*, holds that constructive service is sufficient in actions whose object is "to partition it (property) among different owners," which naturally means cases of probate and administration and includes such *quasi* administration as the present. The decisions quoted by appellant to the effect that proceedings in administration are not *in rem* are all in cases where the Court never acquired any jurisdiction over the subject-matter, because the attempted administration was upon the estate of a living person and in the absence of a statute granting authority; the whole proceeding, therefore, was *coram non judice*, and, of course, constructive notice was insufficient. Our proceedings are a *quasi* administration, which from their nature are adapted to actual administration, and are conducted by a court of competent jurisdiction. The authorities are overwhelming and undisputed that, in such case, where the court has jurisdiction over the subject-matter, decrees made in the granting of probate and letters of administration are in the

nature of proceedings *in rem* and constructive notice is sufficient. *Freeman on Judgments, Sec. 608; Black on Judgments, Sec. 808; Herman on Estoppel, Sec. 327; Runyan's Appeal, 27 Pa. 121; Quidort's Adm. v. Pergeaux, 18 N. J. Eq., 472, 477; Vanderpool v. Van Valkenburgh, 6 N. Y., 190; Storey v. Storey, 120 Ill., 244.*

In reliance upon the foregoing principles, we conclude that the Orphans' Court of Berks County obtained jurisdiction over the person and property of the appellant, unless the particular species of constructive notice prescribed by the Act of 1885 was unreasonable—a defect of which it has never yet been accused, all previous attacks being directed against notice by publication in general and not against the particular form of notice which the Act provides for and which was adhered to strictly in the Cunnius proceedings.

THIRD POINT.—Discussion of the Terms and Effects of the Act of 1885 and of Some Objections thereto.

And first in regard to the charges pressed by appellant against the constitutionality of the Act, because a "Legislature cannot take one man's property and give it to another," because "no man can be condemned without a day in court," and because of other general rules of a similar character. We directly deny that the Act of 1885 violates any of these maxims and think that our arguments under the first two Points in this Brief demonstrate the contrary, as well as the inefficiency of such specious generalities to control specific cases. It is true that a State can not take A's property and vest it in B. Yet, if due proceedings are taken, there is no objection to such a course, as an exercise of the equitable powers of a court or of the taxing powers of a government. Almost directly parallel, in this respect, to the Act of 1885, are the statutory powers over the sale of land of unknown owners given in Pennsyl-

vania by the Act of 1889, *Pamphlet Laws, 277*, and with its counterpart in almost all the States. According to appellant's reasoning, the devolution of property by lapse of time under the Statute of Limitations against the property of a non-resident absentee, would be a most flagrant abuse of the Fourteenth Amendment, for here the property of the individual is snatched from him and transferred to another without even the semblance of notice. Where is the "day in court" of an absentee under a sale of lands for taxes or under the Statute of Limitations, yet who will deny the validity of such enactments? It does not need the citation of authorities in this Court to establish the assertion that in certain cases "due process of law" does not even require the institution of a legal proceeding.

Turning for a moment to the equities of the present action, the doctrine of equitable estoppel can be invoked by the appellee with peculiar force. Mrs. Cunnius had a dower interest against the Reading High School—not a mere personal debt shifting with every change in residence of the individual, but a fixed and immovable charge against one of the best known buildings in the city. Suddenly she disappeared, and, though she had always been paid at this High School building and knew its location perfectly, she never made any demand for her money. Few people with any regard for self would act so foolishly. So, after a period of ten years the School District naturally concluded that she was dead. Meanwhile comes a decree of a Court of seemingly competent jurisdiction, that Mrs. Cunnius is presumed to be dead and a grant of letters of administration to her son. He demanded the dower interest. If the School District had refused he could have brought suit and compelled payment, for even the appellant does not affirm that the Act of 1885 is unconstitutional, unless the supposed decedent is, in fact, alive. If the Orphans' Court had refused to grant administration, an appeal could have been taken to the highest Court in the State, or indeed in the nation, and the Register would have been obliged to issue letters, for at that time Mrs. Cunnius had never been heard

of. Accordingly the School Board paid the dower and the outstanding interest. They are now asked to pay over again to the very person whose supine neglect and utter disregard of the rights of others have caused the whole mischief. If such payment be enforced, is it not a direct violation of the fundamental legal principle, that between two innocent parties he whose acts have occasioned the injury is the one who must suffer thereby?

Finally, a few words about the construction and purposes of the Act of 1885. Its provisions are carefully discussed by Chief Justice Mitchell (Printed Record p. 3–4), who reaches the conclusion that it is "a wise and just statute of sequestration and conservation of property which is without a known owner," for which is created a caretaker "with as complete provision as is practicable for the re-establishment of the rights and possession of the absentee on his reappearance." The same idea was originally advanced by Endlich, J., of the trial Court (Printed Record p. 33–34), who, in an interesting and cogent opinion classed the Act as one for the care of abandoned estates, though he declared against its constitutionality on account of some unimportant defects. We agree with these two jurists that the Act of 1885 may be properly treated as one for the conservation of an absentee's property. We go farther, however, and maintain that even if the Act be regarded as one for provisional distribution—protecting as it does the rights of the absentee if he should reappear—the grant of such jurisdiction is within the legitimate powers of a State government, is grounded upon reason and principle, and has been countenanced judicially by this very Court in sanctioning the exercise of such closely similar powers as were passed upon in *Arndt v. Griggs*.

The need of such a statute as that of 1885 is apparent to the most casual observer, unless, in the words of Judge Mitchell (Printed Record p. 4), "property should lie ownerless or open to conflicting claims." To hold the Act unconstitutional means to declare that the Legislature cannot bestow upon any of its tribunals a valid jurisdiction upon "the estate of persons pre-

sumed to be dead by reason of long absence." It means that if a man be absent, unseen and unheard of for fifty years, there is no method by which his wife and children can be put into possession of his property; for there is no claim that seven years is too short a term, and if the Legislature had fixed upon twenty-five or fifty years as the requisite period, exactly the asme reasoning could be employed against the Act. It means that if a man be a fugitive from justice and hide himself in the uttermost parts of the world for an indefinite time—or if a wife run away with her paramour and blot herself out from all former associations—in neither case can the estate be settled up, or third parties pay money to, or receive it from, any representative, because, after a lapse of years, the absentee may reappear and force a second payment. For one case where injustice might result under the enforcement of the Act, there are hundreds where injury must happen from its overthrow. Though like proceedings were in force under the common law in Pennsylvania from the earliest records, there seems to have been no resurrection of a supposed decedent till *Devlin v. Commonwealth*, in 1882; and the Supreme Court of Rhode Island, in *Carr v. Brown, 38 Atl. R. 9*, say: "Although statutes of similar import have existed in this State for more than a century, no case of this sort has ever before arisen."

The writers are not so utterly at variance with the past and present spirit of judicial interpretation as to contend for a strict, rather than a liberal construction of the Federal Constitution. No matter what were the views of the framers, time, precedent, and circumstance have established the teachings of Hamilton and Marshall rather than of Jefferson and Taney. But there is a point where loose construction must end if words are to be given their natural meaning and if the Constitution, by a process of indefinite expansion, is not to become a phantom of its former self, a useless legal form whose provisions give place entirely to questions of mere expediency. Without such a loose and unwarranted interpretation, how can the words, "due process of law," be so twisted as to denote that the Legislature of

a sovereign State can not create a jurisdiction for one of its tribunals over the estates of absentees presumed to be dead, if the subsequent proceedings do not violate this provision. The phrase, "due process of law," is defined as "a course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights," *Pennoyer v. Neff, 95 U. S., 733.* Does not the Act of 1885 follow these "rules and principles" most closely? The grant of jurisdiction is only to be exercised after the common-law presumption of death has been made out and only according to the rules and principles established in like proceedings *in rem*, and both by the Act itself and by the inherent powers of the Court a method is provided for altering the decree as equity and justice may require. Far from such procedure being "without process of law," has it not followed the course of the common and statute law most strictly in every particular of principle and practice? To prohibit the Legislature from creating a jurisdiction so necessary and exercised so carefully in accordance with due process of law was not the purpose of the Fourteenth Amendment, and is, moreover, contrary to the nature and spirit of the Tenth Amendment, by which all powers not delegated to the United States are reserved to the States or to the people. To invalidate such a well-constructed and highly beneficial statute as that of 1885, would not only be against the legal principles which we have endeavored to demonstrate, but would be a serious blow to the administration of justice and to the proper control of property in all the States of the Union.

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